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IN THE

Supreme Court of the United States

October Term, 1981

STATE OF CONNECTICUT; DEPARTMENT OF ADMINISTRATIVE SERVICES OF THE STATE OF CONNECTICUT; DEPARTMENT OF INCOME MAINTENANCE OF THE STATE OF CONNECTICUT; ELISHA C. FREEDMAN, individually and in his official capacity; and EDWARD W. MAHER, individually and in his official capacity,

Petitioners,

vs.

WINNIE TEAL, DAVID MALSTROM, MARIAN COSTA, EDITH LATNEY, ROSE WALKER, GRACIE CLACK, JEANNIE PICK and LINDA BROOKS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Brief of the National League of Cities and the National Public Employer Labor Relations Association as Amici Curiae in Support of the Petitioners.

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TABLE OF CONTENTS

Page

I.

Interest of the Amici Curiae 1

II.

Statement of the Case 2

III.

Summary of Argument 4

IV.

Argument 9

A. The Nature of Disparate Treatment 9

B. The Nature of the Disparate Impact Theory 10

1. General Description 10

2. Unlike the Disparate Treatment Theory, Which Focuses on Individual Rights, Under the Disparate Impact Theory, Individual Rights Are Based Not on How the Individual Is Treated but on How the Protected Group to Which the Individual Belongs Is Treated 10

3. This Is Not a Case Where Completed Employment Actions by the Employer Establish Discrimination at the Time Suit Is Filed, and the Employer Attempts to Defend on the Basis of Changed Practices Occurring After Suit Was Filed 12

C. Some Statistics Are More Probative Than Other Statistics 14

Page

D. The Bottom Line Concept Has Received Almost Uniform Acceptance as a Superior Statistic to Component Statistics 16

1. Explanation of the Bottom Line Concept . 16

2. The Courts and Commentators Are Virtually Unanimous in Accepting the Bottom Line Concept 17

E. Bottom Line Statistics Are More Probative Than Component Statistics and It Is to Bottom Line Statistics That the Appropriate Test of Statistical Significance Is Applied; Bottom Line Statistics Are Not a Defense Under Which the Employer Must Establish Bottom Line Equivalence 20

F. The Second Circuit's Conclusion That a "Pass-Fail" or "Knock-Out" Barrier Renders the Bottom Line Approach Inapplicable Is Contrary to Both Extensive Authority and Logic 22

G. The Second Circuit's Preference for a Promotion Procedure Without Any "Knock-Out" Components Violates This Court's Admonitions in Furnco 26

H. Unless Reversed, the Second Circuit's Decision Will Present Monumental Practical Problems for Any Employer Having a Multi-Component Selection Process, and for Governmental Employers in Particular 27

I. Rejection of the Bottom Line Approach Is Inconsistent With the Stage II Procedures Mandated by This Court 29

V.

Conclusion 29

TABLE OF AUTHORITIES

Cases	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	20
Brown v. New Haven Civil Service Board, 474 F. Supp. 1256 (D. Conn. 1979)	19, 24
Contreras v. City of Los Angeles, ... F.2d .... (9th Cir. 1981)	5
Cormier v. P.P.G. Industries, Inc., 519 F. Supp. 211 (W.D. La. 1981)	19
Dothard v. Rawlinson, 433 U.S. 321 (1977)	14
EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3rd Cir. 1980)	17, 18, 23, 24
EEOC v. Navajo Refining Co., 593 F.2d 988 (10th Cir. 1979)	18, 24
Friend v. Leidinger, 588 F.2d 61 (4th Cir. 1978), aff'g, 446 F. Supp. 361 (E.D. Va. 1977)	18, 24
Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978)	7, 8, 23, 26
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	10, 18
Hazelwood School District v. United States, 433 U.S. 299 (1977)	4, 5, 6, 14, 15, 21
Hester v. Southern Railway, 497 F.2d 1374 (5th Cir. 1974)	15, 19
Jackson v. Nassau County Civil Service Commission, 424 F. Supp. 1162 (E.D.N.Y. 1976)	19
Kirkland v. New York State Department of Correctional Services, 374 F. Supp. 1361 (S.D.N.Y. 1974), aff'd, 520 F.2d 420 (2nd Cir. 1975), cert. denied, 429 U.S. 823 (1976)	18
Lee v. City of Richmond, 456 F. Supp. 756 (E.D. Va. 1978)	19
Movement for Opportunity and Equality v. General Motors Corp., 622 F.2d 1235 (7th Cir. 1980)	14

Page

Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374 (5th Cir. 1978), cert. denied sub nom., Steel Workers Local 13000 v. Parson, 441 U.S. 968 (1979) 13

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 9, 10

Rule v. International Association of Bridge, etc., Workers, 568 F.2d 558 (8th Cir. 1977) 18

Smith v. Troyan, 520 F.2d 492 (6th Cir. 1975), cert. denied, 426 U.S. 934 (1976) 18

Stewart v. Hannon, 469 F. Supp. 1142 (N.D. Ill. 1979) 19, 24

Teal v. State of Connecticut, 645 F.2d 133 (2d Cir.), cert. granted, ... U.S. .... (1981) 3, 21, 22, 23

Teamsters v. United States, 431 U.S. 324 (1977) 4, 5, 7, 9, 10, 29

United States v. County of Fairfax, 629 F.2d 932 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981) 15

Vulcan Society of NYC Fire Department, Inc. v. Civil Service Commission, 360 F. Supp. 1265 (S.D.N.Y.), aff'd, 490 F.2d 387 (2d Cir. 1973) 17

Vuyanich v. Republic National Bank, 505 F. Supp. 224 (N.D. Tex. 1980) 14

Regulations Page

Code of Federal Regulations, Title 29, Sec. 1607.4 (1981) 19

Code of Federal Regulations, Title 29, Sec. 1607.4(d) (1981) 5

Code of Federal Regulations, Title 29, Sec. 1607.6(B) (1981) 28

Statute

Civil Rights Act, Sec. 706(f)(1), (42 U.S.C. § 2000e-5(f)(1) 4

Textbooks

Baldus and Cole, Statistical Proof of Discrimination .. 5

Schlei and Grossman, Employment Discrimination Law, Treatise (BNA 1976) and Supplement (BNA 1979) 6, 12, 14, 15, 16, 20, 26, 27, 29

Shoben, Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII, 91 HARV. L. REV. (1978) 5

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I.
INTEREST OF THE AMICI CURIAE.

The Amici, hereinafter described, file this Brief because of their concern with numerous issues presented herein, including but not limited to the following:

(1) If one of numerous components in a multi-component selection process is a "knock-out," does this render inapplicable the bottom line approach?

(2) Will bottom line statistics be viewed, as is proper, as a superior form of statistic to component statistics, and thus the statistics to which the appropriate test of statistical significance is applied, or will such statistics be viewed improperly as a defense and, further, a defense which can only be established by proving bottom line *equivalence*?

For the reasons hereinafter set forth, this Court's answers to these questions will seriously affect the ability of employers in general and governmental employers in particular to use tests as component of selection processes, the costs of administering selection processes, the frequency with which expensive validation efforts must be undertaken, and the incentive to engage in affirmative action.

This Brief is submitted on behalf of Amici Curiae, the National League of Cities (NLC) and the National Public Employer Labor Relations Association. Written consent of all parties to the filing of this Brief has been obtained, and letters of consent to such filing are on file with the Clerk of this Court.

The NLC is an instrumentality of cities in the United States. It was established in 1924 and organized in 1933 as an Illinois not-for-profit corporation to assist municipalities in performing their functions. Its membership includes direct member cities, state leagues of municipalities, and state league member cities. Almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of the NLC. The functions of the NLC as authorized in its Bylaws include "the safeguarding of the interests, rights, and privileges of municipalities."

The National Public Employer Labor Relations Association is a public organization comprised of city, county, state, and local school district directors of personnel and employee relations. This organization represents approxi-

mately 750 public jurisdictions in all fifty states. Its members formulate, implement, and administer labor relations policies and practices for these public jurisdictions.

II.
STATEMENT OF THE CASE.

The facts surrounding this dispute are set forth at length in the briefs of the parties, and in the decision of the Second Circuit[1] and will not be repeated herein. Amici wish, however, to underscore three significant facts. The first is that this is a disparate impact and not a disparate treatment case.[2]

Second, the selection process at issue herein was a multi-component selection process, with the first component being a written examination, followed by consideration of (a) past work performance; (b) supervisors' recommendations; (c) the candidates' seniority; and (d) affirmative action considerations. Candidates who did not obtain a passing score of sixty-five on the written examination component of the selection process were "knocked out" of consideration and were not evaluated in light of the other four components in the selection process.[3]

Finally, the plaintiffs below instituted this action after they failed to obtain the minimum passing score of sixty-five in the examination component of the selection process, but before the entire selection process had been completed and before it was known whether or not the total selection process for promotion to permanent Welfare Eligibility Supervisor had a substantial adverse impact upon blacks. After suit was instituted, but prior to the time of trial, the entire

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[1] *Teal v. State of Connecticut*, 645 F.2d 133 (2d Cir.), *cert. granted*, ____ U.S. ____ (1981).

[2] Although the plaintiffs asserted their claims under both theories, the district court determined that only the disparate impact analysis was appropriate. *Id.* at 136. The Second Circuit agreed. *Id.* at 137. The record and the Second Circuit opinion reveal no evidence of disparate treatment.

[3] *Id.* at 135.

selection process was completed,[4] with no adverse impact upon blacks. The selection rate for blacks was approximately 170% of the selection rate for whites.

III.
SUMMARY OF ARGUMENT.

In *Hazelwood School District v. United States*,[5] this Court recognized that in choosing between statistics which are probative, some statistics are more probative than others.[6] In *Hazelwood*, this Court held that although a plaintiff could establish a prima facie case by demonstrating a substantial statistical disparity between the percentage of teachers in the relevant geographic area who were black and the percentage of teachers employed by the school district who

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[4] *Id.* at 136. The record reveals the following time sequence:
December 2, 1978 — examination given. *Id.* at 135.
March 15, 1979 — according to amended complaint, results of examination announced. *See* Joint Appendix, p. 6.
April 6, 1979 — docket sheet states that action was filed. *See* Joint Appendix, p. 2.
May 5, 1980 — amended complaint filed. This was apparently after the selection process was completed since the Second Circuit opinion reveals that the promotions were made approximately a month before trial. 645 F.2d at 136.
May 13, 1980 — answer filed.
May 27-28, 1980 — trial held. *See* Joint Appendix, p. 2.
The record does not reveal why the plaintiffs did not follow the normal course of submitting a Title VII charge to the EEOC, awaiting the 60-day deferral period to an applicable state or local governmental agency, allowing the EEOC to investigate the case, and if cause is found, allowing the EEOC to attempt to secure a conciliation agreement, and, failing that, referring the case to the Attorney General who may bring a civil action. This procedure is set forth in § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1). In any case, it was the plaintiffs' choice to file suit immediately after the examination results were announced, rather than protecting their rights by filing an EEOC charge, and awaiting the conclusion of the selection process.

[5] 433 U.S. 299 (1977).

[6] *See also Teamsters v. United States*, 431 U.S. 324, 340 (1977) ("We caution . . . that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances.").

were black, the case should be remanded to ascertain a superior statistical comparison: whether there was a substantial statistical disparity between the percentage of teachers who were black in the relevant geographic area and the percentage of teachers hired by Hazelwood during the relevant time-frame who were black. This Court thus held that "time-frame" or "flow" statistics are more probative than "static" or "snapshot" statistics.[7] Of critical importance to the instant case, this Court held in *Hazelwood* that on remand *the relevant test of statistical significance*[8] *would be applied to the superior statistics, the flow statistics, and*

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[7]"Time-frame" or "flow" statistics focus on employment decisions made during the time-frame relevant to the litigation. "Snapshot" statistics focus on the overall makeup of the employer's work force at one moment in time, although in most instances that work force is determined by employment decisions made over several decades.

[8]The issue of what is the relevant test of statistical significance is not before the Court in this case. If the statistics are not finely tuned, such as a comparison of the percentage of minorities in the employer's work force to the percentage of minorities in the general population, this Court has held that the statistical disparity must be "gross." *Teamsters v. United States, supra* note 6 at 337-38 and nn. 20, 23 & 24. If the statistics are finely tuned, there are at least three possible tests for statistical significance: (1) the .05 level of statistical significance; (2) the "two or three standard deviations" test set forth in *Hazelwood, supra* note 5; and (3) the four-fifths or 80% rule set forth in the Uniform Guidelines of Employee Selection Procedures prepared by the Equal Employment Opportunity Commission, 29 C.F.R. § 1607.4(D) (1981). The .05 level of statistical significance means that the probability of the statistical disparity occurring by chance is 5%. It has become a convention in social science to accept as statistically significant values which have a probability of occurring by chance not more than 5% of the time. *See Contreras v. City of Los Angeles,* ____ F.2d ____ n. 3 (9th Cir. 1981) (the .05 level of statistical significance is generally recognized as the point at which statisticians draw conclusions from statistical data). *See generally* D. Baldus & J. Cole, *Statistical Proof of Discrimination,* § 9.221 at 308 n. 36. The .05 level of statistical significance test is generally consistent with the two or three standards deviation test set forth in *Hazelwood, supra* note 5. Actually, 1.96 standard deviations equates with the .05 level of statistical confidence. D. Baldus & J. Cole, *supra,* § 9.0 at 297. The four-fifths or 80% rule set forth in the Uniform Selection Procedures has been sharply criticized. Shoben, *Differential Pass-Fail Rates in Employment Testing: Statistical Proof Under Title VII,* 91 HARV. L. REV. 793, 805 (1978).

that to rebut the plaintiff's prima facie statistical proof case, the employer need not prove the total absence of any disparity.[9] In *Hazelwood*, there was no burden on the employer to prove, through the superior "flow" statistics, that its hiring of blacks during the relevant time-frame exactly equated with or exceeded the black applicant flow; it was sufficient if an analysis of the superior statistics revealed an absence of a substantial statistical disparity.[10]

"Bottom line" statistics, which analyze the entire employment process, are a superior form of statistics to "component" statistics, which analyze only one component of the selection process.[11] "Bottom line" statistics are superior to "component" statistics in exactly the same way that "flow" statistics are superior to "snapshot" statistics — they present a more realistic picture of what is actually happening in the selection processes at issue in the litigation. As in *Hazelwood*, if proper component and bottom line statistics are both presented to the Court, it is to the superior bottom line statistics that the applicable test of statistical significance must be applied.[12]

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[9]Thus, in *Hazelwood*, this Court indicated that the test of statistical significance applied to the superior "flow" statistics would be the same as the test applied to the "snapshot" statistics. *Compare Hazelwood School District v. United States*, 433 U.S. at 308 n. 14 (analysis of snapshot statistics) *with* 433 U.S. at 311 n. 17 (analysis of "flow" statistics). Both suggested analyses utilize the "two or three standard deviations" test.

[10]These principles are thoroughly analyzed in Schlei and Grossman, *Employment Discrimination Law, Supplement* (BNA 1979) (hereinafter cited as *Supplement*) at 296-305 and 318-29. It should be noted that one of the counsel for amici is a co-author thereof.

[11]*See* Schlei and Grossman, *Supplement* at 329 ("The Problem of Conflicting Statistical Conclusions: . . . '[B]ottom line' statistics are normally more probative than 'component part' statistics.' ").

[12]As noted, the issue of what is the appropriate test of statistical significance is not before the Court. *See* note 8, *supra*.

In this case, Connecticut can prove not only the lack of a bottom line significant statistical disparity, not only bottom line equivalence, but bottom line statistics actually favoring blacks. Amici fear that because of this factual context, this Court might in its opinion use language which could be construed as requiring all bottom line statistics to be analyzed under an "equivalence" test rather than recognizing that as a superior source of statistics, bottom line statistics are *the* statistics to which the applicable test of statistical significance must be applied.

The Second Circuit, although accepting the basic concept that the components of a selection process will not normally be evaluated for disparate impact if the bottom line shows no such impact, erroneously concluded that this principle is inapplicable if the component in question is a "pass-fail" barrier. This conclusion was based on the Second Circuit's confusion between the disparate treatment and disparate impact theories of discrimination.

It is of course true under the disparate treatment theory that an employer remains liable for an individual act of intentional discrimination despite good statistics.[13] Furthermore, in both disparate treatment and disparate impact cases, an employer who for a period of time has discriminated with respect to completed employment decisions cannot immunize such acts by a later change in its practices.[14] However, neither of these principles in any way affects the essential nature of the disparate impact theory of discrim-

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[13]*Furnco Construction Corp v. Waters*, 438 U.S. 567, 579 (1978) ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.").

[14]*Teamsters v. United States*, 431 U.S. 324, 341-42 (1977) ("[T]he company had engaged in a course of discrimination that continued well after the effective date of Title VII. The company's later changes in its hiring and promotion policies could be of little comfort to the victims of the earlier post-Act discrimination, and could not erase its previous illegal conduct or its obligation to afford relief to those who suffered because of it.").

ination — that an individual has rights only because of the effect of a process of selection on the overall group of which the individual is a member. Winnie Teal's right to recover against the State of Connecticut is totally dependent on how the State of Connecticut's selection devices affect *other blacks*. It makes no difference whether the test that Winnie Teal failed to pass was the first or last stage of a multi-component selection process. The important thing for her is whether she received the promotion. The important thing for her lawsuit is whether the selection process in question resulted in a substantial disparate impact against the group to which she belonged, blacks.[15]

The Second Circuit's conclusion that Connecticut would have prevailed if it had reached exactly the same result by waiting until the end of the selection process and then subjectively analyzing all components, rather than eliminating persons who scored at an unacceptably low level on the written test component, clearly ignores the direction of this Court that a court of appeals, based on its concept of fairness, absent illegality, should not require employers to restructure their employment procedures.[16]

It is bothersome that the defendant in a lawsuit can determine the result thereof by actions it takes a year after the complaint is filed, one month before trial. This is probably the unstated explanation for the Second Circuit's decision.

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[15]This is not a case of an employer who intentionally discriminated against a specific individual, and tried to defend based on a balanced work force (disparate treatment case), or an employer who, with a qualified applicant flow that was 20% black, hired blacks at a 5% rate for many years until litigation began, and then hired blacks at a rate far in excess of 20%, and tried to defend based on an overall average of its hiring rate for pre-suit and post-suit years, lumped together (change from pattern of discrimination to pattern of nondiscrimination in final employment decisions).

[16]*Furnco Construction Corp. v. Waters*, 438 U.S. at 578 ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it.").

However, it was the plaintiff and not the defendant who chose to rush to court before all the facts were in, and without waiting for the normal conclusion of the administrative process.[17]

IV.
ARGUMENT.

A. The Nature of Disparate Treatment.

The essence of disparate treatment is different treatment, that a member of a protected group was treated differently and less favorably than such person would have been treated had he or she been white or male.[18] Assuming that the above can be established, it matters not at all how the employer treats other individuals in the plaintiff's protected group. The essence of disparate treatment is individual rights. For example, if the supervisor of Winnie Teal and the other respondents refused to allow them to take the test at issue because of racial animus, whereas all other applicants were permitted to take the test, this would be a classic example of disparate treatment, and Connecticut's liability to Teal would be unaffected by the fact that the selection process ultimately resulted in a selection rate for black applicants 170% that of white applicants.

The concept that good statistics will not redeem an act of intentional disparate treatment is established by *Phillips v. Martin Marietta Corp.*[19] In *Phillips*, the employer refused to accept applications from females with preschool children while accepting such applications from males with preschool children. Thus, a woman with a three-year-old child would not be hired, whereas a similarly situated man with a three-

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[17]*See* note 4, *supra*.

[18]*Teamsters v. United States*, 431 U.S. 324, 335-36 n. 15 (1977) ("The employer simply treats some people less favorably than others because of their race . . . . Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.").

[19]400 U.S. 542 (1971).

year-old child would be hired. Both lower courts held for the employer since "70-75% of the applicants for the position . . . were women; 75-80% of those hired for the position . . . were women . . . ."[20] This Court quite correctly reversed, holding that one hiring policy for women and another for men, clear disparate treatment, is not redeemed by statistics showing that women in general are fairly treated.[21]

B. The Nature of the Disparate Impact Theory.

1. General Description.

This Court has described the disparate impact theory as follows:

> "Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. . . . Proof of discriminatory motive, we have held, is not required under a disparate impact theory."[22]

2. Unlike the Disparate Treatment Theory, Which Focuses on Individual Rights, Under the Disparate Impact Theory, Individual Rights Are Based Not on How the Individual Is Treated but on How the Protected Group to Which the Individual Belongs Is Treated.

The Second Circuit held that Winnie Teal, eliminated from consideration because she failed to achieve a passing score on a test, could not have her rights determined by how the employer treated other members of her protected

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[20] *Id.* at 543.
[21] *Id.* at 544.
[22] *Teamsters v. United States*, 431 U.S. at 335-36 n. 15. *See also Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) ("Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.") (Emphasis in original).

group. In so holding the Second Circuit totally misconceived the nature of the disparate impact theory, in which individual rights can only exist based upon the employer's treatment of a much larger group of persons to whom the plaintiff belongs.

For example, assume that the State of Connecticut is hiring 1,000 highway patrol officers from among 10,000 applicants, and the sole criterion for selection is performance on an unvalidated written test. The exact same test is given under identical conditions which protect confidentiality at ten different locations throughout the state on ten consecutive Saturdays, no selections will be made until the test is given at all ten locations, and a passing score of sixty-five is required for hiring consideration. Assume that 1,000 applicants take the test at each location, that Teal and the other respondents take the test in Hartford on the first Saturday it is given, receive their test scores two days later, and fail to meet the minimum standards for consideration for hiring. Of the 1,000 persons who took the test, 50% of the whites who took the test on the first Saturday passed it whereas only 35% of the blacks who took the test on that date passed it. Is the selection process illegal? Does Teal have a right to recover? The answer is that we do not know. The selection process is final as to her, but we do not know if she has a right to recover because under the disparate impact theory, her right to recover is dependent upon how her group fares with respect to the selection process, and all the results are not yet in. If, in the above example, blacks perform well at the other nine locations, and when all the results are in the test does not have a substantial adverse impact upon blacks, Teal will not recover even though she failed the test and even though blacks taking the test at the Hartford location failed the test at a statistically significant higher rate than whites.

Another example will demonstrate this principle. An employer is opening a new factory and it is hiring 100 em-

ployees, all to do routine assembly work. As its sole criterion for hire, the employer uses a test, which it has designed, which has not been validated, and whose disparate impact, if any, is unknown. If the first person applying is Winnie Teal, and Teal fails the test and is not hired, the sample size at this juncture is too small to determine whether the test has a statistically significant impact upon blacks. Whether or not Teal has a cause of action would be dependent upon whether, if ever, enough persons and enough blacks take the test to form a statistically significant sample, and what effect the test has on persons who have not yet applied for work.[23]

Each of the above examples is illustrative of the proper analysis of the instant case. Teal's position is no different when she failed the first of ten sessions of the test than the position she occupies in the actual case before this Court. In each case, her rights are dependent upon how the process treats other members of her protected group. Teal's rights in the hypothetical where she is the first applicant for the 100 assembly positions is again identical; whether she prevails will be dependent upon how the selection process in question treats other members of her group.

3. This Is Not a Case Where Completed Employment Actions by the Employer Establish Discrimination at the Time Suit Is Filed, and the Employer Attempts to Defend on the Basis of Changed Practices Occurring After Suit Was Filed.

Assume that during the pre-suit portion of the time-frame relevant to a particular lawsuit the black component of the qualified applicant flow and the black hiring rate were as follows:

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[23]Numerous courts have recognized that the disparate impact theory cannot be premised on an excessively small sample size. *See generally* Schlei and Grossman, *Supplement* at 328-29 n. 124 and accompanying text. If in the above example Teal filed suit immediately after being rejected and the employer, who as of that date had given the test only to a small number of applicants, abandons the test, Teal could not recover under the disparate impact theory.

	Qualified Black Applicant Flow	Black Hiring
1975	20%	5%
1976	20%	5%
1977	20%	5%

Assume that the lawsuit is filed on January 1, 1978, that trial begins on January 1, 1981, and during the three years between the filing of suit and trial the relevant hiring statistics are as follows:

	Qualified Black Applicant Flow	Black Hiring
1978	20%	35%
1979	20%	35%
1980	20%	35%
Average for all six years	20%	20%

Under the above example, the employer's liability for its pre-suit practices would be unaffected by its substantially increased black hiring after suit was filed.[24] In the hypothetical, the employment decisions during the pre-suit years were final, and the employer's change in its hiring practices could not affect those who were the victims of discrimination in the pre-suit years.

The facts herein are absolutely distinguishable from the "in the face of litigation" situation. Here, the State of Connecticut did not take *ex post facto* action to remedy unlawful employment discrimination following the accrual of a cause of action to the respondents and after institution of suit. Rather, the plaintiffs below chose to institute liti-

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[24]*See* note 14, *supra* and accompanying text. *See also Parson v. Kaiser Aluminum & Chem. Corp.*, 575 F.2d 1374, 1386 (5th Cir. 1978), *cert. denied sub nom., Steel Workers Local 13000 v. Parson*, 441 U.S. 968 (1979) ("[A]ctions taken in the face of litigation are equivocal in purpose, motive and permanence . . . and do not redress the grievances of those injured by the previous practices.").

gation before the selection procedures were complete, and the employer merely let the selection procedure run its course. No one will ever know whether the results of the selection procedure were affected by the filing of suit, but this was the choice of the plaintiffs below.

C. Some Statistics Are More Probative Than Other Statistics.

In most class-type employment discrimination lawsuits, statistics play the dominant role. The primary battleground is the probative force of the statistics used to support plaintiffs' presentation of the prima facie case vis-a-vis any alternative statistical analysis offered by the defendant. Most statistically-based cases are decided by determining which statistics are more appropriately focused and therefore more probative.[25] As this Court made clear in *Dothard v. Rawlinson*,[26] once the plaintiff has introduced statistics in support of its case, the defendant is free to introduce more probative statistical analysis "[i]f the employer discerns fallacies or deficiencies in the data offered by the plaintiff."

The key decision of this Court analyzing the relative probative force of alternative statistical presentations is of course *Hazelwood School District v. United States, supra*. In *Hazelwood*, the Court drew the following comparisons between probative and *more* probative statistics:

(1) "Time-frame" or "flow" statistics are more probative than "static" or "snapshot" statistics of an employer's work force at a fixed period in time;[27]

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[25]*See* Schlei and Grossman, *Supplement* at 319 ("Since statistics 'come in infinite variety,' [citing *Teamsters*] the key battleground has become *what* statistics are more probative.") (Emphasis in original).

[26]433 U.S. 321, 331 (1977).

[27]433 U.S. at 309-11. *See* notes 5-12, *supra* and accompanying text. *See also Movement for Opportunity and Equality v. General Motors Corp.*, 622 F.2d 1235, 1244-45 (7th Cir. 1980) (prima facie case based on snapshot statistics rebutted by time-frame statistics); *Vuyanich v. Republic National Bank*, 505 F. Supp. 224, 360 (N.D. Tex. 1980) ("[W]ithout question flow statistics are a superior measure of hiring discrimination during a given time period.").

(2) Qualified potential applicant statistics are more probative than general population statistics;[28]

(3) Statistics honed to the proper geographic area are more probative than undifferentiated geographic statistics;[29] and

(4) Actual qualified applicant flow data is a more probative comparison to hiring statistics than theoretically available potential applicant flow data.[30]

Hazelwood and its progeny have established that all statistics are not created equal, that the more finely honed the statistic, the greater its relevance to what is actually happening in the selection process, the greater its probative value, and, concomitantly, if the employer presents statistics of equal or greater probative value to those presented by the plaintiff, and the employer's statistics show no substantial adverse impact, the employer will prevail.

Schlei and Grossman[31] analyzed "the problem of conflicting statistical conclusions" as follows:

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[28]This Court stated: "When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." 433 U.S. at 308 n. 13.

[29]In *Hazelwood*, the question was whether the City of St. Louis, which had committed itself to having 50% of its teachers be black, should be included in the geographic area from which Hazelwood could potentially draw teachers. The Court directed trial of this issue on remand. 433 U.S. at 308.

[30]The Court noted that such applicant flow data would be "very relevant." 433 U.S. at 308 n. 13. Numerous lower courts have so held. *See, e.g., United States v. County of Fairfax*, 629 F.2d 932, 940 (4th Cir. 1980), *cert. denied*, 449 U.S. 1078 (1981) (applicant flow data found to be the most probative proof of availability); *Hester v. Southern Ry.*, 497 F.2d 1374, 1379 (5th Cir. 1974) ("The most direct route to proof of racial discrimination in hiring is proof of disparity between the percentage of blacks among those applying for a particular position and the percentage of blacks among those hired for the position.").

[31]*Supra* note 25 at 329.

"Virtually all of the well-tried class action cases now present the problem of conflicting statistical conclusions. That result is understandable in light of the great variety of possible 'sources' of statistics . . . . [F]our generalizations may be stated concerning how courts deal with this problem.

"First, 'finely tuned' statistics are normally far more probative than generalized statistics. Second, 'time frame' statistics are normally far more probative than 'static' statistics. *Third, 'bottom line' statistics are normally more probative than 'component part' statistics.* Fourth, once conflicting statistical conclusions result from statistics which are reasonably particularized and reliable (and therefore reasonably probative), the plaintiff will normally be found not to have sustained its ultimate burden of proof regarding the showing of discriminatory impact." [Emphasis added].

D. The Bottom Line Concept Has Received Almost Uniform Acceptance as a Superior Statistic to Component Statistics.

1. Explanation of the Bottom Line Concept.

The "bottom line" approach recognizes that the disparate impact of one portion of a selection procedure may be balanced by other elements of the process: although one component has a substantial adverse impact upon a protected group, another component may favor that group, whereas a third component may favor still another protected group, and that the most probative of the statistics is a statistical measure of the entire process. In a typical bottom line case, the plaintiff presents valid statistics establishing a substantial disparity between the success rate of the protected group and the success rate of the majority group with respect to *one component of the selection process*, such as a scored test. For example, the plaintiff might establish that 1,000 whites and 500 blacks took a scored test, and that 500 whites

(50%), but only 150 blacks (30%) passed the test. The defendant[32] would respond by pointing out that the impacting component is only one portion of a multistage selection process, that other components of the selection process favor blacks, and at the "bottom line," there is no substantial statistical disparity. In the above example, the defendant might present evidence that the other components of the selection process resulted in the hiring of 100 whites (10% of the original applicants), and 45 blacks (9% of the original applicants).[33] Thus, under any test of statistical significance,[34] at the "bottom line" there is no substantial statistical disparity.

2. The Courts and Commentators Are Virtually Unanimous in Accepting the Bottom Line Concept.

The decision of the Second Circuit below is an aberration from a clear line of authority endorsing the bottom line concept as a superior form of statistic.

In *EEOC v. Greyhound Lines, Inc.*,[35] the EEOC attacked the employer's policy of refusing to consider bearded men for public contact positions. Because of a skin condition peculiar to blacks which prohibits many blacks from shaving, this policy had a substantial adverse impact upon

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[32]The bottom line approach frequently benefits plaintiffs. For example, if none of the components of a multistage selection process had a statistically significant disparate impact, the bottom line might nevertheless show such an impact. If blacks fared 80% as well as whites on each stage of a five-stage selection procedure, at the bottom line blacks would only fare 33% as well as whites ($.8^5 = .328$). *See Vulcan Society of NYC Fire Dep't, Inc. v. Civil Service Comm'n*, 360 F. Supp. 1265, 1272 (S.D.N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973) (defendant contended that plaintiff's proof improperly lumped together the impact of several components; the trial court rejected this approach, noting "the examination may not be truncated; whether or not it has an adverse discriminatory impact upon minority groups should be considered in terms of the total examination procedure.").

[33]This would mean that after the test, 20% of the 500 remaining whites but 30% of the 150 remaining blacks succeeded.

[34]*See* note 8, *supra*.

[35]635 F.2d 188, 193 (3rd Cir. 1980).

blacks. The Third Circuit found this irrelevant, because the employer employed a higher percentage of black male employees in its public contact jobs than would be expected due to their availability.[36]

In *EEOC v. Navajo Refining Co.*,[37] the defendant used as a "knock-out" its requirement, as a prerequisite to employment, of a high school diploma or equivalent and a passing grade on a test.[38] The court of appeals held that the disparate impact of the test and high school diploma requirement did not result in illegal discrimination since in a community with a 23.2% Hispanic work force, and an applicant flow that was 30% Hispanic, Hispanics constituted 38% of the employer's hires.[39]

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[36]*Id.* ("We need not consider the alleged disparate impact of Greyhound's no-beard policy because there was no actual discrimination or disparity in its hiring").

[37]593 F.2d 988 (10th Cir. 1979).

[38]*Griggs v. Duke Power Co., supra* note 22 found illegal high school diploma and test-passing requirements where these requirements did have an actual effect on the ability of the protected group to receive the jobs at question.

[39]593 F.2d at 990. Numerous other courts have preferred bottom line statistics. *E.g., Friend v. Leidinger*, 588 F.2d 61, 66 (4th Cir. 1978), *aff'g*, 446 F. Supp. 361 (E.D. Va. 1977) ("The best comparison is between the number of blacks and whites who initially sought promotion . . . and the number who were actually promoted."); *Rule v. International Ass'n of Bridge, etc., Workers*, 568 F.2d 558, 565 & n. 10 (8th Cir. 1977) (plaintiffs challenged aptitude test, which accounted for 15 of a possible 100 points which would determine who could enter an apprenticeship program; this approach rejected in favor of bottom line approach since "as the process as a whole does not have a disparate exclusionary impact on blacks, then the fact that blacks fare less well than whites on one 'subtest' is insufficient to establish a prima facie case."); *Smith v. Troyan*, 520 F.2d 492, 497-98 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976) (blacks fared badly on a particular test, but did almost as well as whites with respect to actual hiring; a test with a disparate impact need not be validated unless there is a substantial disparity in the hiring rate, and the fact that 33% of the applicants were black and 29% of the hires were black "not sufficient"; "that blacks fare less well than whites on . . . a 'subtest' in the process of hiring . . . police officers, is insufficient . . . to require defendants to justify the [test] as being job-related."); *Hester v. Southern Ry. supra* note 30

(footnote continued on following page)

Furthermore, the federal government's Uniform Guidelines on Employee Selection Procedures recognize and endorse the bottom line concept to the extent that:

> "If this information [concerning the total selection process] shows that the total selection process does not have an adverse impact, the Federal enforcement agencies, in the exercise of their administrative and prosecutorial discretion, in usual circumstances, will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components, and will not take enforcement action based upon adverse impact of any component of that process, including the separate parts of a multipart selection procedure or any separate procedure that is used as an alternative method of selection."[40]

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at 1381-82 (district court's testing relief is overturned where entered "without competent proof of discrimination by the railway in its hiring . . . ."); *Cormier v. P.P.G. Indus., Inc.*, 519 F. Supp. 211, 278 (W.D. La. 1981) ("In examining selection procedures which allegedly have had a disparate impact, the court must first determine whether the selection procedure in its entirety has resulted in a meaningful or substantial exclusion of blacks from the job opportunity in question. If there is no disparate impact in the overall process then there is no prima facie case of disparate impact discrimination."); *Stewart v. Hannon*, 469 F. Supp. 1142, 1149 (N.D. Ill. 1979) ("knock-out" written component of selection process had adverse impact; insufficient since "[t]he challenge is . . . to one component of the hiring decision, not to the decision itself. This is not enough . . ."); *Brown v. New Haven Civil Serv. Bd.*, 474 F. Supp. 1256, 1261 (D. Conn. 1979) ("the majority [of courts] have held that the selection process as a whole, rather than any segment of it, should be examined for disproportionate impact in a Title VII case."); *Lee v. City of Richmond*, 456 F. Supp. 756, 771 (E.D. Va. 1978) ("The crucial fact in determining disparate impact is the rate at which blacks are ultimately chosen for the position rather than their test scores made in the process of selection."); *Kirkland v. New York State Dep't of Correctional Servs.*, 374 F. Supp. 1361, 1370 (S.D.N.Y. 1974), *aff'd* 520 F.2d 420, 425 (2nd Cir. 1975), *cert. denied*, 429 U.S. 823 (1976) (§ 1983 case) ("Any other approach conflicts with the dictates of common sense."); *Jackson v. Nassau County Civil Serv. Comm'n*, 424 F. Supp. 1162, 1168 n. 11 (E.D.N.Y. 1976) ("if the final result of the examination procedure does not evidence a discriminatory impact, cultural or racial bias in individual test items is irrelevant.").

[40]29 C.F.R. § 1607.4 (1981).

E. Bottom Line Statistics Are More Probative Than Component Statistics and It Is to Bottom Line Statistics That the Appropriate Test of Statistical Significance Is Applied; Bottom Line Statistics Are Not a Defense Under Which the Employer Must Establish Bottom Line Equivalence.

Consider, hypothetically, that the State of Connecticut is hiring highway patrol officers. The first stage of the hiring is a test, the test has a substantial disparate impact, but of the 1,000 blacks and 1,000 whites who apply, Connecticut ultimately hires 100 whites (10% of the white applicants) and 99 blacks (9.9% of the black applicants). If the "bottom line" approach is viewed as a defense and, furthermore, if to establish the defense, the employer must prove *bottom line equivalence*, Connecticut would lose in this hypothetical, whereas if one more black were hired, Connecticut would prevail. Since in the actual case before the Court, Connecticut established far more than bottom line equivalence, Amici are concerned that in ruling for the State of Connecticut this Court will use language which could lead lower courts to conclude that the bottom line approach is a defense, and moreover, the employer must bear the burden of proof to establish bottom line *equivalence*. The following factors support the view that bottom line statistics are a superior form of statistics and not a defense:

(1) This Court has held many times that in disparate impact cases, the burden does not shift to the employer unless and until disparate impact is established by proper statistical proof.[41]

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[41] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (employer's burden to show job-relatedness arises only if plaintiff establishes that selection procedures "select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."). *See generally* Schlei and Grossman, *Employment Discrimination Law* (BNA 1976) (hereinafter cited as *Treatise*) and *Supplement*, Chapter 36 (Proof), Section II.

(2) In each of the decisions endorsing the bottom line concept set forth in Section D.2., *supra*, the court correctly analyzed bottom line statistics in determining whether the plaintiff had established its prima facie case, with the burden of proof remaining at all times on the plaintiff on this issue.

(3) In *Teal*, even the Second Circuit correctly analyzed that the bottom line approach related to whether or not the plaintiff had established a prima facie case.[42]

(4) In *Hazelwood*, this Court clearly established that when a defendant comes forward with more probative statistics, it is to those statistics that the test of statistical disparity will be applied.[43]

If the bottom line approach is viewed as a defense, and further, for it to be applicable, the employer must prove bottom line equivalence, severe and undesirable results would occur. Consider the following hypothetical, under which each of the three stages in the selection process is a knock-out:

	White Pass Rate	Black Pass Rate	Hispanic Pass Rate	Female Pass Rate	Male Pass Rate
Stage I	80.0%	60.0%	50.6%	50.4%	60.0%
Stage II	51.0%	80.0%	60.0%	80.0%	50.2%
Stage III	60.0%	50.8%	80.0%	60.0%	80.0%
Final Selection Rate	24.5%	24.4%	24.3%	24.2%	24.1%

Under this example, if the employer had to prove bottom line equivalence when one or more components had a substantial adverse impact, the employer would be liable to blacks, Hispanics, and males, and, arguably, if females could be considered in relation to whites, to females also. In short, when two or more groups are being statistically compared, it is rare to find exact equivalence between any

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[42]645 F.2d at 133.

[43]*See* note 9, *supra*.

two, let alone more than two. If equivalence is the standard, and different groups fare differently on different components of the selection process, liability to some group will almost always be found. The only way to avoid such illogical results, with large liability dependent upon minuscule differences in effect, is to recognize bottom line statistics for what they are, a superior statistical analysis of the selection process, and thus the statistics to which the appropriate test of statistical significance is applied.

F. The Second Circuit's Conclusion That a "Pass-Fail" or "Knock-Out" Barrier Renders the Bottom Line Approach Inapplicable Is Contrary to Both Extensive Authority and Logic.

The essence of the decision by the Second Circuit below is that a multi-component selection process containing one component having disparate impact does not violate Title VII so long as all candidates are permitted to complete the entire process, whereas the identical process does violate Title VII if the process contains a "knock-out" or "pass-fail" barrier that does not permit all candidates to complete the entire selection process. Thus, the Second Circuit below held:

> "*Where all of the candidates participate in the entire selection process, and the overall results reveal no significant disparity of impact, scrutinizing individual questions or individual sub-tests would, indeed, 'conflict [ ] with the dictates of common sense.'* [citation omitted] *Where, however, an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process, a different result must obtain*' "[44]

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[44]645 F.2d at 138 (Emphasis added).

In reaching this conclusion, the Second Circuit confused the disparate treatment and disparate impact theories. It relied heavily on this Court's decision in *Furnco*, a disparate treatment case, citing this case for the following proposition:

> "Where an employment practice forecloses a disproportionate number of persons in a protected group from a job opportunity, it matters very little to the victimized individuals that their group as a whole is well represented in the group of hirees."[45]

The argument which the Second Circuit accepted, described above, that the disparate treatment principles set forth in *Furnco* are applicable to disparate impact cases, was proposed by the EEOC to the Third Circuit in *EEOC v. Greyhound Lines, Inc.*[46] In rejecting the contention that disparate treatment principles are applicable to disparate impact cases, the Third Circuit thoroughly analyzed the distinctions between the theories:

> "EEOC could not contend, in the face of this data, that black males were underrepresented in Greyhound's workforce. It argues, however, that a disparate impact case can be established without proof of a discriminatory effect on the workforce. In support of that proposition, it relies primarily on the following passage from *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978): 'It is clear beyond cavil that the obligation imposed by Title VII is to provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force.' *Id.* at 579, 98 S.Ct. at 2950 (emphasis in original). Read in its context, however, *Furnco* does not support the Commission's argument. *Furnco* was not a case of disparate impact,

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[45]*Id.* at 140.
[46]635 F.2d 188 (3d Cir. 1980).

but a case of 'disparate treatment' under the theory of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973). There can be no doubt that each worker is entitled to equal treatment regardless of his race; hiring members of a racial group in proportion to its share of the population does not license an employer to treat subsequent applicants unfairly on account of their race. *Furnco* does not apply to the case before us, however, where there is no allegation of disparate treatment on account of race but only that a facially neutral policy has had a disparate impact.

"We hold, therefore, that no violation of Title VII can be grounded on the disparate impact theory without proof that the questioned policy or practice has had a disproportionate impact on the employer's workforce. This conclusion should be as obvious as it is tautological: there can be no disparate impact unless there is disparate impact."[47]

The Third Circuit thus applied the bottom line concept even though the challenged selection criterion was a first-stage "knock-out" which did not allow the individual to proceed further in the selection process. Numerous other courts have endorsed the bottom line approach where the challenged component was a "knock-out" or "pass-fail" barrier.[48]

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[47] *Id.* at 192.

[48] *EEOC v. Navajo Refining Co.*, 593 F.2d at 992 (high school diploma or equivalent and passing score on test were "knock-outs"); *Stewart v. Hannon*, *supra* note 39 (failure of assistant principals to score high enough on pencil-and-paper test to get to interview stage); *Friend v. Leidinger*, 588 F.2d 61, 66 (4th Cir. 1978), *aff'g*, 446 F. Supp. 361, 372-73 (E.D. Va. 1977) (challenge to "knock-out" written component of promotion procedure rejected since bottom line showed 4.5% of black applicants and 5.3% of white applicants were finally promoted; challenged written test had adverse impact upon blacks because only 21% of blacks passed whereas 36% of whites passed); *Brown v. New Haven Civil Serv. Bd.*, 474 F. Supp. at 1260 (120 of 194 whites passed but only 30 of 99 blacks passed "knock-out" written examination; bottom line revealed no significant disparity).

The fallacy in the Second Circuit's reasoning can be demonstrated by a *reductio ad absurdum* example. Assume that the State of Connecticut uses a two-component selection process for promotion to Welfare Eligibility Supervisor. One component is a written test; the second component is a point-count score from supervisorial performance evaluations. For ease in administration, the applicants are divided into three groups, each group has the same racial make-up, and one-third of the positions will be filled from each group of applicants. Groups A and B require a candidate to receive *both* a 70% score on the test and a 70 out of 100 point count on the supervisorial evaluations. Assume that for each group 60% of the whites but only 40% of the blacks pass the test, but that 60% of the blacks and only 40% of the whites pass the performance evaluation cutoff. Assume further that Group A administers the "knock-out" test component first, and that Group B administers the "knock-out" supervisorial evaluation component first. Assume that Group C administers both components to everyone, and subjectively chooses those candidates who do "best" on a combination of test score and performance evaluation. Moreover, in all three groups, 24% of the black applicants and 24% of the white applicants are promoted.

Under the rationale of the Second Circuit, certain blacks in Group A and whites in Group B have definitely established a prima facie case and will recover, unless the employer proves the job-relatedness of its selection devices, since they were prevented from moving to the next step of the process. Although the Second Circuit's rationale is not clear, arguably certain whites in Group A and blacks in Group B can also recover, since they were "knocked out" by a discrete component, albeit the final step of the selection process, which component had a disparate impact. However, no one in Group C can possibly prevail even though the unstructured and subjective selection process led to exactly the same percentage of successful black and white

candidates as did the processes in Groups A and B.[49] To state the above example is to demonstrate the irrationality of the approach.

G. The Second Circuit's Preference for a Promotion Procedure Without Any "Knock-Out" Components Violates This Court's Admonitions in Furnco.

Apparently the Second Circuit felt that Connecticut would consider the qualifications of more minorities if it was required to allow all applicants to go through the entire selection process, with no stage of the selection process being a "knock-out." Thus, the Second Circuit, despite a lack of bottom line disparate impact, wanted the employer to consider beyond the test stage the qualifications of the largest possible number of minority applicants. Such an approach directly contradicts this Court's admonitions in *Furnco*:

> "The Court of Appeals . . . thought Furnco's hiring procedures not only must be reasonably related to the achievement of some legitimate purpose, but also must be the method which allows the employer to consider the qualifications of the largest number of minority applicants. We think the imposition of that second requirement simply finds no support either in the nature of the prima facie case or the purpose of Title VII."[50]

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[49]Such a result is especially ironic in light of the frequency with which courts in employment discrimination litigation have condemned subjective hiring and promotion processes. *See generally* Schlei and Grossman, *Treatise* and *Supplement*, Chapter 6 (Subjective Criteria).

[50]*Furnco Construction Corp. v. Waters*, 438 U.S. at 576-77. *See also* note 16. Although *Furnco* was a disparate treatment case, this Court's conclusion that the federal courts were ill-suited to structure selection procedures, absent illegality, has relevance to the whole field of employment discrimination law.

H. Unless Reversed, the Second Circuit's Decision Will Present Monumental Practical Problems for Any Employer Having a Multi-Component Selection Process, and for Governmental Employers in Particular.

There is no question that if the Second Circuit's decision is not reversed, it will have a tremendous and devastating impact upon any employer using a test as a component of its selection process, and upon public employers in particular. Many, if not most, civil service systems require a written test as a component of the selection process. Under the Second Circuit's rationale, even if the entire selection process did not have substantial adverse impact upon any protected group, the plaintiff could establish a prima facie case of discrimination if a pass-fail written test component did have such an adverse impact. The employer thereafter would be required to undertake a validation study to demonstrate that the test was in fact job-related. Unfortunately, such validation studies, even in those instances where they can be performed, are expensive.[51]

Aside from the monumental problems faced by employers attempting to validate tests, there is the practical problem that employers often do not and cannot know whether a test has a disparate impact on any protected group until the test is given. Once the test is given, however, and if disparate impact is shown, the employer can then engage in corrective measures including affirmative action to assure that the overall process does not have a disparate impact. This approach has been approved by the government's Uniform

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[51]Thus, the principal draftperson of the 1970 EEOC testing guidelines has testified that he is aware of only three or four criteria-related validation studies which met those guidelines, and that the only one of those three or four whose costs he knew involved a sample of approximately 200 bus drivers and had required an expenditure of approximately $400,000. Schlei and Grossman, *Treatise* at 103 n. 60.

Guidelines on Employee Selection Procedures, which provide:

> "*Where validity studies cannot or need not be performed.* There are circumstances in which a user cannot or need not utilize the validation techniques contemplated by these guidelines. In such circumstances, the user should utilize selection procedures which are as job-related as possible and which will minimize or eliminate adverse impact, as set forth below."[52]

Under the Second Circuit's rationale, if validation is impossible or not feasible, and one component of the selection process has adverse impact, the law would require that each and every applicant be permitted to complete the entire selection process. This would have disastrous consequences for government employers in terms of both tremendous costs and inability to effectively administer their selection processes. For example, under the Second Circuit's rationale, if the State of Connecticut were going to hire 250 new highway patrol officers, and it received 10,000 applications for those positions, if the testing component (or any component) of the selection process had adverse impact, the State would be required to permit all 10,000 applicants to complete all components of the selection process, regardless of the fact that many of the applicants have no chance whatsoever of being selected because of their inability to achieve a minimum passing score on a test. Completion of an entire selection process with 10,000 applicants would take years, and until the process was complete, the State would be unable to fill those 250 positions.

In short, the Second Circuit's decision makes no sense as a matter of fact, as a matter of law, or as a matter of practicality, and must be reversed.

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[52]29 C.F.R § 1607.6(B) (1981).

I. Rejection of the Bottom Line Approach Is Inconsistent With the Stage II Procedures Mandated by This Court.

Employment discrimination class actions are normally bifurcated into two phases: Stage I determines the defendant's liability, and Stage II determines individual entitlement to back pay relief.[53] At Stage II, the court determines the "shortfall," *i.e.*, the difference between the number of protected class members who should have been hired or promoted absent discrimination, and the number of blacks who were actually hired or promoted.[54] It then allocates the "shortfall" to those class members whom it concludes would have been hired or promoted in the absence of discrimination.[55]

If there is no bottom line disparity, there is no "shortfall," and no number of spots to be allocated among the class members. Rejection of the bottom line concept would thus be inconsistent with the relief procedures mandated by *Teamsters*.

V.
CONCLUSION.

For all of the foregoing reasons, amici curiae respectfully submit that the decision of the Second Circuit should be reversed, that bottom line statistics, when available, should be properly recognized as superior to component statistics.

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[53]*See* Schlei and Grossman, *Treatise* at 1260. In *Teamsters v. United States*, 431 U.S. 324 (1977), this Court approved of such bifurcation in a government pattern-or-practice suit:

> "When the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief."

431 U.S. at 361.

[54]*Teamsters v. United States*, 431 U.S. at 371-72.

[55]*Id.* ("[T]he court will be required to balance the equities of each minority employee's situation in allocating the limited number of vacancies that were discriminatorily refused to class members.").

and thus, when so available, as the statistics *to which the appropriate test of statistical significance is applied.*

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Respectfully submitted,

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